(d) deal with such offender in the manner provided by the Juvenile Courts Acts, 1947.

It is quite plain and obvious, this form of punishment of whipping or caning under s 293(i)(c) of the CPC is to be made on a youthful offender who has been *'convicted before any Criminal Court'*. The words *'convicted'* and *'Criminal Court'* are quite simple, clear and incapable of being manoeuvred to include any other meaning. Nor is there room at all for interpretation. A glance at the CPC and comparing it with the JCA will clearly show the obvious difference between an open criminal court and that of the Juvenile Court. Penal terms have to be strictly constructed and interpreted and we cannot import something which is not there.

Our juvenile, the subject of this revision, was *not convicted* and the court before which he was tried was *not* a *criminal court.*

Section 293 of the CPC envisages a situation where a juvenile is being charged together with an adult in an open criminal court and he is convicted of a charge, say of robbery. Even in this instance, there is no mention or provision for the magistrate taking upon himself to execute the caning.

The saving provision of s 4(5) of the JCA of applying the provisions of the CPC cannot be invoked as the JCA did not modify or extend the applicability of s 293 of the CPC because the legislature had deliberately used the words 'Criminal Court' and the word 'convicted' in s 293 of CPC. If the words 'or Juvenile Court' had been inserted after the words 'Criminal Court' and the words 'or finding of guilt' inserted after the word 'convicted' in s 293 of the CPC, then only can s 293 of the CPC be applicable, *provided there is also an amendment to the JCA to include caning.*

It is the ruling of this High Court that s 293 of the CPC, as it now stands, cannot be applied to a Juvenile Court case. On the other hand, a criminal court can apply the provisions of the JCA in cases where a youthful offender has been convicted.

Subsection (i)(d) of s 293 of the CPC would not have been legislated specifically for the criminal court to apply the provisions of the JCA if at all s 293 of the CPC itself was already applicable to cases before the Juvenile Court.

No doubt many of the boys nowadays are vicious, violent and criminally prone and they do deserve to be caned to inculcate some sense of discipline in them. But then the provisions for such caning must be spelled out in the law in clear language. A judge cannot be the prosecutor, judge and executioner at the same time in a case. Only in rare cases of contempt of court to protect the court itself can a judge be also the prosecutor in the case. *But never the executioner* and a judge at the same time.

Even in cases where a youthful offender is convicted before a criminal court and if the magistrate is to carry out the order of caning himself, then he would have a stake in the outcome of the case. He would then have an interest in the case. If he has this interest in the outcome of the case, inevitably and invariably there will be a finding of guilt. Invariably and inevitably, there will follow the punishment of caning. He therefore cannot be said to be impartial. His findings and judgments in all cases involving juveniles will be obsessed by getting the offence proved at all costs and the sentence will always be caning and he himself carrying it out even in spite of the recommendation of the probation officer, as happened in the instant case which is the subject of this revision.

Order accordingly.

Reported by *Mathavan Devadas*

Subramaniam v Esso Malaysia Bhd

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 99 OF 1981
MUSTAPHA HUSSAIN J
25 JANUARY 1990

Labour Law — Absence from work — Not self imposed — Whether contract of employment frustrated — Wrongful dismissal — Damages

Contract — Frustration — Order of detention — Whether contract of employment frustrated

Damages — Wrongful dismissal — Quantum of damages

The plaintiff, during his employment by the defendant, was placed under detention for two years under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. While under detention, the plaintiff requested that the defendant allow him to return to work after the detention. The defendant refused and instead terminated his service for failing to report for duty. The plaintiff sued for wrongful dismissal. The defendant claimed that the plaintiff's contract of employment had been frustrated by reason of his detention.

Held, allowing the plaintiff's claim:

(1) The defendant terminated the plaintiff's contract on the ground that he had been absent from work. There was no mention of frustration in their correspondence, although it was pleaded in the defence.

(2) Since the plaintiff's service was terminated on the ground of being absent from work and his absence was not self imposed, the defence of frustration could not be sustained. The plaintiff had therefore been wrongfully dismissed.

(3) The quantum of damages was confined to what the plaintiff could have earned if not for the breach of contract, up to the time he could find new employment.

Cases referred to

1 *Hare* v *Murphy Brothers Ltd* [1974] 3 All ER 940 (refd)
2 *Chakki* v *United Yeast Co Ltd* [1982] 2 All ER (refd)
3 *Calcutta Dock Labour Board* v *Jaffar Iman* AIR 1966 SC 282 (refd to)
4 *Workmen, Calcutta Dock Labour Board* v *Employers* AIR 1973 SC 2251
5 *SR Fox* v *Ek Liong Hin Ltd* [1957] MLJ 1 (folld)
6 *D'Cruz* v *Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154 (folld)

Karpal Singh for the plaintiff.
Ambiga Sreenevasan (Ms) for the defendant.

Cur Adv Vult

Mustapha Hussain J: The plaintiff, Subramaniam, was in the employment of the defendant as a process technician at the defendant's refinery at Port Dickson from 1963 earning about $900 per month.

On 16 June 1977, the plaintiff was detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The plaintiff's brother, on behalf of the plaintiff, wrote to the defendant requesting two months' leave to which the defendant replied on 23 June 1977 asking the plaintiff to be contacted and the plaintiff to write and give reasons.

The plaintiff was held incommunicado and only on 29 June 1977 the plaintiff's brother was allowed to see the plaintiff. On the same day, the plaintiff wrote to the defendant saying he was detained by the police for reasons which were not clear to him and asked the defendant to place him on a no pay leave during his detention.

The order of detention by the Home Minister placed the plaintiff in Pulau Jerejak for two years commencing 14 August 1977. While the plaintiff was in detention at Pulau Jerejak, the defendant wrote a letter dated 12 July 1977 requesting the plaintiff to report for duty on the 4pm to 12am shift on 23 August 1977. The plaintiff replied on 16 August 1977 to the defendant explaining his plight and about the detention and pleaded that he be allowed to resume employment after serving his two-year detention. Then the defendant wrote by letter dated 30 August 1977 that since the plaintiff had failed to report for duty on 23 August 1977, the plaintiff had breached his contract of service and he himself had thereby terminated his service with the defendant.

The plaintiff's brother wrote a letter dated 28 September 1977 to the Director of Industrial Relations, Negeri Sembilan, Seremban, explaining the circumstances and asked the Director to intercede in the matter, but to no avail.

Thus, the above are the facts of the case. One thing is very clear here. The plaintiff, due to his detention by the police, was unable to report for duty to the defendant. His inability was not self imposed. The question for determination of the court is whether the termination of employment of the plaintiff in the circumstances of the case is wrong in law.

It is the contention of the defendant that as the plaintiff had failed to report for duty on 17 June 1977, the plaintiff had breached the implied terms of employment and hence the defendant was entitled to treat the plaintiff's contract of employment as determined by the plaintiff's own conduct.

It is the contention of the plaintiff that he was physically unable to turn up for work as he was under detention by the police under an emergency law but he had done everything possible to write letters pleading that he could not attend work and applying for no pay leave and stating that he would resume work after his release from detention.

In the very lengthy submissions by both parties, the defendant raised the issue of *frustration.*

Authorities were cited but reliance was placed on the case of *Hare* v *Murphy Brothers Ltd*,[1] where the sentence of imprisonment was for 12 months and the court held that the contract was frustrated. On the other hand in *Chakki* v *United Yeast Co Ltd*,[2] where the imprisonment was only for 24 hours, the court held the contract was not necessarily frustrated immediately from the date of sentence. The court suggested before deciding on the issue of frustration, one should look from the commercial point of view as to whether a replacement has to be engaged, in view of the length of absence from work. Since the plaintiff here was detained for two years and was placed on restriction for a further period of six months, it is the contention of the defendant based on *Hare* v *Murphy Brothers Ltd*[1] that the contract of employment of the plaintiff was frustrated.

On the other hand, the plaintiff contends that the plaintiff was physically unable to report for work and that before the defendant terminated his contract of employment, there should at least be an enquiry — relying on *Calcutta Dock Labour Board* v *Jaffar Iman*,[3] and *Workmen, Calcutta Dock Labour Board* v *Employers*.[4]

Going through the correspondence as agreed in the bundle, the defendant's letter dated 30 August 1977 clearly stated that since the plaintiff had failed to report for duty on the 4pm to 12am shift on 23 August 1977, which he was required to do so by the letter dated 12 July 1977, the contract was terminated. What this means is that the plaintiff's contract was terminated on the ground of being absent or in other words on the ground of the plaintiff's conduct. No where was there any mention about 'frustration', although in the statement of defence it is averred as a ground to terminate.

It is an unfortunate case where the plaintiff had not only lost as few years of freedom but also he lost his livelihood. He simply could not be present for work on 23 August 1977 and he himself informed the defendant. Since the service was terminated on the ground of being absent from work on 23 August 1977 and that his absence was not self imposed but forcefully imposed by law, the defence of 'frustration' which was not the reason when the plaintiff's employment was terminated cannot be sustained at this late stage. The defendant knew all along that the plaintiff simply could not be present as the defendant knew the plaintiff was under detention. The defendant should have said so right from the beginning.

The court therefore rules that the ground (ie absence from duty) is not tenable and hence the plaintiff was wrongfully dismissed and therefore the defendant was in breach of contract.

The plaintiff here is not a musician who had contracted to play the piano at night and who was drafted into the army; nor was he under a contract to write a book and became mad — where the contract was indeed frustrated. Here we have the plaintiff working since 1963 and was hauled up by the police and detained under an emergency law. He simply could not be present at his work.

Since there was an order of court dated 13 May 1983, there is only left the question of damage for breach of contract to be awarded to the plaintiff. The amount of damages, following *SR Fox* v *Ek Liong Hin Ltd*[5] and *D'Cruz* v *Seafield Amalgamated Rubber Co Ltd*[6] is confined to the loss of earnings which the plaintiff would have earned but for the breach of the contract, to the time when he could find another employment. This boils down to how many months notice the plaintiff was entitled to and should have been given. He did obtain a job getting $400 to $500 per month to mitigate the damage.

The plaintiff's eventual release from detention and restriction was on 24 February 1980, when he was physically able to continue work.

Accordingly, the plaintiff is entitled to three months' notice in lieu, ie $900 x 3 = $2,700.

The plaintiff is also entitled to the $900 per month less $400 (taking the lower figure than $500) per month from the date of release from restriction, ie in February 1980 till filing of his writ on 2 June 1981 amounting to $500 x 16 months = $8,000.

Therefore, judgment for the plaintiff is as follows:

(1) Damages for wrongful dismissal $10,700 with 4% interest per annum from 24 February 1980;
(2) Costs.

Unfortunately, there was an order of court dated 13 May 1983, otherwise the plaintiff would have been awarded on the other items.

Order accordingly.

Solicitors: *Karpal Singh & Co*; *Skrine & Co.*

Reported by *Mathavan Devadas*

Wan Munah bte Wan Embong Dan Lain-Lain lwn Pemungut Hasil Tanah, Kuala Terengganu

MAHKAMAH TINGGI (KUALA TERENGGANU) — USUL PEMULA NO 1 TAHUN 1982
ABDUL RAZAK H
7 JANUARI 1990

Undang-Undang Tanah — Pengambilan tanah — Permohonan oleh tuan tanah agar mahkamah mengisytiharkan pengambilan balik tanah mereka dimansuh dan diketepikan — Penyiasatan dan pembayaran telah dibuat terlalu lewat — Tuan tanah mengalami kerugian — Permohonan dibenarkan dan pengambilan yang baru diadakan — Akta Pengambilan Tanah 1960, s 3

Di dalam kes ini, plaintif telah membuat permohonan supaya mahkamah mengisytiharkan pengambilan enam lot tanah kepunyaan mereka yang dilakukan oleh defendan dimansuh dan diketepikan. Pengambilan itu dilakukan pada 19 Jun 1975 tetapi pembayaran telah dibuat pada Januari 1979, yakni empat tahun selepasnya. Pihak plaintif menimbulkan dua hujah. Pertamanya, penyiasatan dan pembayaran itu telah dibuat terlalu lewat, maka mereka telah mengalami kerugian. Keduanya, defendan telah menyalahgunakan kuasa mereka dengan menggunakan tanah-tanah tersebut bagi maksud yang bukan semacam mana yang diisytiharkan.

Diputuskan, membenarkan permohonan plaintif:

(1) Mahkamah mendapati kelewatan yang terlampau bagi mengadakan penyiasatan dan membuat pembayaran pampasan dalam kes ini telah mendatangkan ketidakadilan yang mudarat kepada plaintif kerana mereka telah mengalami kerugian yang terlalu tinggi. Pengambilan baru perlu diadakan dan hendaklah ditarikhkan kepada masa pampasan itu dibuat pada 1979.

(2) Hujah kedua ditolak kerana tujuan pengambilan itu masih ujud iaitu, kegunaannya untuk perumahan di bawah s 3 Akta Pengambilan Tanah 1960 masih dikekalkan, sungguhpun bentuknya itu mungkin agak berubah sedikit.

[In this case, the plaintiffs made an application to court for a declaration that the acquisition of six lots of their land carried out by the defendant be quashed and set aside. The acquisition was carried out on 19 June 1975 but the compensation was paid out only four years thereafter, in January 1979. The plaintiffs raised two arguments. First, the inquiry and payment of compensation were made too late. Henceforth, they suffered loss. Secondly, the defendant had abused his powers by using the said land for a different purpose from that which was declared.